SUPREME COURT OF THE UNITED STATES.

SAMUEL B. DOWNES, PLAINTIFF IN ERROR,

vs.

GEORGE R. BIDWELL, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1900.

No. 507.

ON WRIT OF ERROR.

SAMUEL B. DOWNES, PLAINTIFF IN ERROR, VS. GEORGE R. BIDWELL, DEFENDANT IN ERROR.

STATEMENT.

The plaintiff is here under a writ of error to review and correct a judgment of the circuit court of the United States for the southern district of New York entered on the 30th day of November, 1900, sustaining a demurrer to the complaint and dismissing said complaint with costs.

The action was brought to recover certain sums of money exacted by the defendant, the collector of customs at the port of New York, as import duties upon two shipments of fruit brought from the ports of San Juan and of Mayaguez, in the island of Porto Rico, to the port of New York in the month of November, 1900.

The contention of the complaint was that the goods in question having come from Porto Rico were not "imported from any foreign country within the meaning of any valid statute or executive order of the United States, but were merchandise which must under and by virtue of the provisions of the Constitution of the United States in that regard be admitted to free entry in any port of the United States." (Rec., fol. 8.)

The demurrer was sustained on the ground that the complaint did not state facts sufficient to constitute a cause of action (fol. 12).

This brings before the court these questions.

I.

Whether Porto Rico, from which island the goods were concededly brought, was a foreign country, so that goods brought from there were "articles imported from a foreign country" according to the terms of the Dingley Act (1897—30 Stat., p. 151).

II.

Whether the act passed April 12, 1900 (3 Stat., p. 77), requiring the payment of import duties on merchandise from a port of Porto Rico, as a condition of entry into other ports of the United States, contravenes the prescriptions of the Constitution that "*all duties, imposts*

and excises shall be uniform throughout the United States" (Art. I, Section VIII, ch. 1), and that "*no tax or duty shall be laid on articles exported from any State. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another*" (Art. I, Sec. IX, ch. 5).

The argument upon these points may well be initiated by borrowing from the Attorney-General an admirably clear statement of the position, one of the few that commend themselves to our acceptance. We quote from page 11 of the Government brief in the Goetze and Pepke cases argued on the 17th of December, 1900.

> "The Government of the United States has been vested, not with all powers, but only with certain particular powers. These particular delegated powers are in some respects limited and confined in scope and operation, but in other respects they are entirely unlimited. So that the real and practical question is whether there is any limitation preventing the particular thing here complained of."

In other words: Did the Constitution which vested Congress with the power "to lay and collect taxes, duties, imposts, and excises," coupled with the limitation that "all duties, imposts, and excises shall be uniform throughout the United States," authorize such limitation to be ignored and set aside in every part of the United States except within the determinate boundaries of fully organized States? Did the inhibition in the same article of the Constitution (Art. I, Sect. IX-5) that "no tax shall be laid on articles exported from any State" leave Congress free to levy a prohibitory tariff upon the product of the great Northwest Territory which the States had ceded to the new nation? Does the inhibition that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another" leave Congress at liberty to destroy the commerce of San Juan or Sitka by preferential regulations of commerce or of revenue?

The answer to these inquiries involves a judicial determination as to what territory is alien or national; as to whether a country can be foreign over which this Government exercises absolute sovereignty and dominion exclusive of any other claimant.

The answer involves further a judicial determination as to the fundamental character of the government established by the people when the Constitution was adopted; whether it was intended to carry out the principles of the declaration and create within its jurisdiction complete self-government, or whether its purpose was a dual system, of constitutional self-government for the original States and Congressional extra-constitutional government for every other part of the national domain.

I.

Is Porto Rico a foreign country, so that goods brought from there are "articles imported from a foreign country" and lawfully chargeable with import duties under the tariff act of 1897?

What is the test of alienage? What country is *foreign* to the United States?

It is permissible in answering a question which resolves itself into so elementary a form to begin with the elementary definition of the dictionary.

The alien, then, is one born out of the jurisdiction and owing obedience to a strange prince or country (Rapelyea Law Dict., citing Coke on Litt., 128 C., and Bracton, 427).

And *foreign* is that which is out of a certain State or country and of its jurisdiction; foreign laws are the laws of another country than our own.

> "Commerce with foreign nations must signify commerce which in some sense is necessarily connected with these nations, transactions which either immediately, or at some stage of their progress, *must be extra-territorial* (*Veazie* v. *Moore*, *14 How.*, *572*)."

A country not subject to our laws and not within our limits.

In the case of the *Cherokee Nation* (*5 Pet.*, *1-15*, &c.), the Supreme Court "recognized the Cherokee Nation as a State," but yet refused to recognize it as a *foreign* State, because, although they had been "uniformly treated as a State, numerous treaties made with them recognizing them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements," yet "the Indian *Territory was admitted to compose a part of the United States.* In all maps, geographical treaties, histories, and laws it is so considered. In all our intercourse * * * they are considered as within the *jurisdictional limits* of the United States, subject to many of the restraints which are imposed upon our own citizens. They acknowledge themselves * * * to be under the protection of the United States; they admit that the United States shall have the sole and exclusive right of regulating the trade with them, &c. (p. 10). They may more correctly perhaps be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, &c. They look to our Government for protection, rely upon its kindness and its power; appeal to it for relief to their wants. * * * They and their country are considered by foreign nations, as well as by ourselves, *as being so completely under the sovereignty and dominion of the United States* that any attempt to acquire their lands, or to form a political connection with them would be considered by all as an invasion of our territory and an act of hostility" (p. 17).

(Cited by Harlan, J., in Elk *v.* Wilkins, 112 U. S., 122.).

The treaty of peace ceded to the United States the territory, the dominion, the sovereignty of Porto Rico. The island came under the protection of the United States; the United States from that moment alone possessed and exercised all jurisdiction over the island; had the sole and exclusive right to regulate trade with it. The Congress of the United States was specifically recognized under the terms of the treaty as having legislative control of the political status and civil rights of its native inhabitants, and those inhabitants were invested with the nationality of the acquiring power.

These elements more than fulfill the requirements laid down in the case of the Cherokee Nation as sufficient to strip a territory of every foreign characteristic and stamp it as "a part of the United States."

If the treaty did not make it a "part of the United States," how could the Congress of the United States be vested with the right to legislate for it and to determine the "civil rights and political status of its native inhabitants?" The Congress of the United States is not invested by

the Constitution, and cannot therefore be invested by treaty with the power to legislate for a foreign country. It has been held that neither our Constitution nor our laws can have virtue or efficacy abroad. If the treaty has any force it ceded the island to the United States, and the island being thus ceded, came within the legislative dominion of the Congress, under that article of the Constitution which gives it power to make all needful rules and regulations respecting the territory of the United States, and in accord with the general spirit of that instrument.

The boundaries of the United States were enlarged by the treaty making power competent to operate that metamorphosis. (*Fleming* v. *Page*, 9 Howard, 603–615–16–18.)

It has been urged that the ports of Porto Rico remain foreign ports as to revenue laws until Congress has established custom-houses, framed collection districts, and declared the ports domestic.

This theory is based upon a dictum in *Fleming* v. *Page*, 9 How., 603–616.

The decision in that case was to the effect that while Tampico, in the Republic of Mexico, was in the possession of the United States forces during the war with Mexico, it still remained a Mexican port, being only in the military occupation of the United States, and must remain foreign during such occupation, as *only the treaty making or legislative power could enlarge the boundaries of the country.* The case thus established clearly that the action of the treaty-making power was sufficient to make the port domestic, and the illustration that it remained foreign as to the revenue laws until a collection district was mapped out and a custom-house provided has no part in the decision, and is at variance with the course of the Administration and with the decision of this court in *Cross* v. *Harrison*, 16 How., 164, where the collection of duties on foreign goods landed in California after the ratification of the treaty and before any action of Congress was upheld on the ground that California had become a part of the United States.

If the Government is to rely upon the dictum referred to, then the continuance of the foreign status to ports in lawfully acquired and duly ceded territory must rest upon the inaction of Congress.

This contention means, if it means anything, that the inaction of Congress in so legislating would suspend and paralyze the operation of the treaty even after its ratification by the upper house of that same Congress, to which the Constitution confides that important function, and after its proclamation by the Executive.

The effect of this would be that the mere failure of Congress to regulate the civil rights and political status of the inhabitants of the new acquisition would prevent such territory from becoming a part of the conquering or purchasing country and keep it still an alien land.

Congress could thus accomplish by its inaction what it is forbidden to do by legislation. It may not, by legislation, impose duties which shall not be uniform throughout the land, but by its inaction it could carry out this prohibited result.

The query is therefore pertinent:

If Congress may not by direct legislation ignore the injunction of the Constitution as to the uniformity of imports throughout the country and as to freedom from taxation on importations from one part of the country to another part, may it avoid and evade these prescriptions by inaction?

The legal and political effect of a treaty duly concluded by the authorized powers can not be defeated by the neglect of Congress to legislate for the needs of the country acquired under its terms. Congress is free to exercise its rights and legislate for the new territory whenever it pleases to do so. But meanwhile the rights acquired by our nation over the territory will neither be lost nor left in entire abeyance. It is not denied that treaties may become operative by their own force and without the aid of legislation (*Chinese Exclusion Cases, 130 U. S., 600*). This theory was reduced to actual practice when, upon the ratification of the treaty of Guadaloupe Hidalgo, and before Congress took any action, California became a part of the United States, the military authorities exercised the functions of a *de facto* civil government and collected duties on goods landed in California in accordance with the terms of previously existing revenue laws (*Cross* v. *Harrison, 16 How., 164*).

If treaties may thus become operative by their own force and without the aid of Congressional legislation, how can it be that the Constitution has not equal virtue and that its imperative mandates must remain impassive and unobserved until Congress chooses to take action?

That there may be in newly acquired territory an interregnum by the inaction of Congress, during which certain usual operations of government are held in abeyance, is no answer. Such interregnum can be terminated at the will of Congress, or Congress may see fit to leave unused those functions of government. The essentials of government are none the less operative—the attributes and rights of sovereignty do not expire by the inaction of Congress; the only question is, Under what charter and subject to what limitations are they exercised? The first stage is military occupation; this ends in the treaty of peace which cedes the sovereignty to the conquering power; the next step is the jurisdiction of the civil power; if the officials to exercise this civil power are not appointed, nor the rules and laws laid down for its operation, none the less has the *military* occupation of an enemy's country ceased, and the rules laid down by the political authorities in the case of California furnishes the ready solution of the problem, to wit: That military government ending with the treaty of peace, the military authorities from that moment constituted a *de facto* government until Congress should provide another, and as such *de facto* government should enforce the laws of the United States—even to the collection of such duties as the laws of Congress imposed—thus no longer exercising military power, but the functions of civil government, which is always subject to all the fundamental limitations of the civil rule.

The treaty of Paris has made Porto Rico "foreign" to every nation except our own.

"*That island is fully and without question under the sovereignty of the United States*," says the Secretary of War (*Rep. of Nov., 1899, p. 27*). Immediately upon the transfer of the island from Spain to the United States Spain erected a tariff barrier against the introduction of Porto Rican products. The interests of Cuban agriculture led to the erection of a similar barrier in the tariff adopted for Cuba, so that Porto Rico was debarred from the principal markets which she had previously enjoyed, and at the same time this country has maintained its tariff against Porto

Rican products just as it existed *while the island was Spanish territory*. The result is that there has been a wall built around the industry of Porto Rico," &c. (p. 33).

"The treaty of peace," says Senator Foraker, "closed against Porto Rico, except on payment of high duties, the ports of both Spain and Cuba" (*Rep. No. 249—5 Feb., 1900—on Porto Rico bill, p. 2*). "It seems," he adds, "that one of our own possessions * * might be allowed the same privileges with respect to our own market, *of which it has become a part*, that are accorded to *other sections of the country*" (p. 7).

"The cession of a territory, by its name, from one sovereign to another, conveying the compound idea of surrendering at the same time the lands and the people who inhabit them, would be necessarily understood to pass the sovereignty. * * The people change their allegiance; their relation to their ancient sovereign is dissolved. * * * If it be ceded by the treaty the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed (Am. Ins. Co. *v.* Carter, 1 Pet., p. 542). The same act which transfers that country transfers the allegiance of those who remain in it; and the law which may be denominated political is necessarily changed."

How then can this country, "fully and without question under the sovereignty of the United States," which is no longer Spanish territory, whose relation to its former sovereign is dissolved, the allegiance of whose people has passed to this Government, over which the Congress of the United States has full legislative sway, be considered in any respect or in any relation a country "foreign" to the United States?

II.

Does the act passed April 12, 1900, requiring the payment of import duties on merchandise brought from a port of Porto Rico as a condition of entry into other ports of the United States, contravene the prescription of the Constitution?

First. The power given to Congress to "lay and collect taxes, duties, imports, and excises," is unquestionably limited and circumscribed by the injunction that such "taxes, duties, imports, and excises shall be uniform *throughout the United States*."

In order to uphold the validity of the Foraker act the Government must show that Porto Rico is no part of the United States.

It must further show that Congress has power to legislate for Porto Rico without regard to the precept of uniformity in taxation laid down in the article quoted.

That Porto Rico is no longer a "foreign country" seems indisputable.

Is there under our Constitution an intermediate state between "foreign" and "national?"

If so, is territory in such an intermediate state out of the pale of constitutional protection and left to the uncontrolled action of Congress?

We do not hesitate to affirm that neither in international nor in constitutional law is there such a condition of territory that it lies under no sovereignty, under no national dominion, unless it be "undiscovered country." With reference to every civilized government all territory is either foreign or national.

Under the Constitution, however, there is a condition where certain territory has not yet acquired that peculiar sovereignty of its own known to our Constitution as statehood. While in that condition, as a part of the Federal nation, such territory is subject exclusively to Federal control, exercised by the Congress of the United States. This condition has been aptly described by Chief Justice Marshall as "a state of infancy advancing to manhood, looking forward to complete equality so soon as that state of manhood shall be attained" (5 Wheat., 317-334).

None the less is the infant a member of the family, with lesser privileges and under more strict parental authority; but not an outlaw, with no rights, privileges, or safeguards, and subject only to the will and caprice, indulgent or malevolent, of the governing hand.

> "The territories acquired by Congress, whether by deed of cession from the original States, or by treaty with a foreign country, are held with the object, as soon as their population and condition justify it, of being admitted into the Union as States, upon an equal footing with the original States in all respects."
>
> Gray, J., in *Shively* v. *Bowlby*, 152 U. S., 49.

What are, then, the limitations to which Congress is subjected in the government of these infants?

This inquiry may be preceded by another, Whence does Congress derive its power or authority over this unorganized territory?

Unquestionably from the Constitution of the United States.

It is to be found in the text of Art. IV, Sect. III, cl. 2, which says that "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," and in cl. 1, which says that "new States may be admitted by the Congress into this Union."

It is also to be found, as determined by this court, in the inherent power to govern territory which under the Constitution we have the right to acquire (*Seré* v. *Pitot*, 6 Cranch, 336), and in virtue of the general right of sovereignty which existed in the Government (*Am. Ins. Co.* v. *Canter*, 1 Pet., 542, 546).

The only source of this right or power of governing new territories not yet organized into statehood flows from the Constitution; we must look to that same charter for the limitations controlling the exercise of the right and power so given.

This has been the subject of much controversy, but with most of it this court need not now be burdened, both because the application of these limitations to many personal and civil rights has been repeatedly upheld by this court, and because the indisputable propriety of such application has been unquestionably admitted by various organs of the Government. To these voices may be added those of statesmen and jurisconsults.

The Attorney-General has stated:

> "The Government of the United States has been vested, not with all powers, but only with certain particular powers. These particular delegated powers are in some respects limited and confined in scope and operation, but in other respects they are entirely unlimited. So that the real and practical question is whether there is any limitation preventing the particular thing here complained of." (Page 11 of brief in *Goetze* v. *U. S.*)

The Secretary of War has stated:

"The people of the ceded islands have acquired a moral right to be treated by the United States in accordance with the underlying principles of justice and freedom which we have declared in our Constitution and which are the essential safeguards of every individual against the powers of government; not because these provisions were enacted for them, but because they are essential limitations inherent to the existence of the American Government." (Annual Report for 1899, page 26.)

Senator Foraker, in recommending the bill for the government of Porto Rico, says:

"As to all prohibitions of the Constitution laid upon Congress while legislating, they operate for the benefit of all for whom Congress may legislate, no matter where they may be situated. * * * This is so *because the Congress in all that it does* is subject to and governed by those restraints and prohibitions. * * * These limitations are placed upon the exercise of the legislative power without regard to the place or the people for whom the legislation in a given case may be intended; and for this reason they enure to the benefit of all for whom Congress may undertake to legislate, without regard to whether the provisions of the Constitution, as such, have been extended to them. * * * Congress can not deny them." (Senate committee report No. 249, Feby. 6, 1900, on bill for temporary civil government for Porto Rico.)

Pomeroy, in his Constitutional Law, § 492, says:

"The safeguards of individual rights—those clauses which preserve the lives, liberty, and property of the citizens from the encroachments of arbitrary power—must apply as well to that legislation of Congress which is concerned exclusively with the District of Columbia or with the Territories as to that which is concerned with the States."

Webster says:

"I do not say that while we sit here to make laws for these Territories we are not bound by every one of the great principles which are intended as securities for public liberty, but they do not exist in the Territories until they are introduced by authority of Congress." (Curtis's Life, Volume II, 366.)

On the 23rd of March, 1848, he said in the Senate:

"Arbitrary governments may have territories and distant possessions, because arbitrary governments may rule them by different laws and different systems. Russia may rule in the Ukraine provinces of the Caucasus and Kamchatka by different codes, ordinances, or ukases. We can do no such thing. They must be of us—*part* of us—or else strangers.

"I think I see *that* in progress which will disfigure and deform the Constitution. * * * I think I see a course adopted that is likely to turn the Constitution under which we live into a deformed monster—into a curse rather than a blessing—in fact, a frame of an unequal government, not founded on popular representation,

not founded on equality, but founded on the grossest inequality; and, I think, that this process will go on, or that there is danger that it will go on, until this Union shall fall to pieces." (Works, Vol. 300.)

This court has said:

"The people of the United States, as the sovereign owners of the national Territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion they are represented by the Government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms, or in the purpose and objects of the power itself; for it may well be admitted in respect to this, as to every power of society over its members, that it is not absolute and unlimited. * * * The personal and the civil rights of the inhabitants of the Territories are secured to them, as to other citizens, by the principles of constitutional liberty, which restrain all the agencies of government, State and national; their political rights are franchises which they hold as privileges in the legislative discretion of the Congress of the United States. This doctrine was fully and forcibly declared by the Chief Justice, delivering the opinion of the court in *National Bank* v. *County of Yankton*, 101 U. S., 129. See also *American Insurance Company* v. *Canter*, 1 Pet., 517; *U. S.* v. *Gratiot.*, 14 Pet., 526; *Cross* v. *Harrison*, 16 How., 164; *Dred Scott* v. *Sandford*, 19 How., 393." (*Murphy* v. *Ramsey*, 114 U. S., 44.)

"Doubtless Congress, in legislating for the Territories, would be subject to fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments, but these limitations would exist rather by inference and the general spirit of the Constitution, from which Congress derives all its powers, than by any express and direct application of its provisions."

(*Mormon Church* v. *U. S.*, 136 U. S., 1–67.)

These words were repeated with approval by Mr. Justice Harlan in *McAllister* v. *U. S.*, 141 U. S., 188, and the same principle again affirmed in *U. S.* v. *Kagma*, 118 U. S., 390; *Callan* v. *Wilson*, 127 U. S., 550; and finally, completely and irrevocably in the opinion of Mr. Justice Harlan in *Thompson* v. *Utah*, 170 U. S., 346.

The controversy, therefore, narrows itself to the question whether "the particular thing here complained of"—the imposition of duties on the products of Porto Rico—is obnoxious to any limitation in the Constitution.

If so, it being conceded that these limitations apply to every action of Congress, the act of April 12, 1900, imposing duties on the products of Porto Rico must be held invalid.

We have seen under Point I that Porto Rico is no longer a foreign country; it remains to be seen whether it is embraced in the broad term used in Article I, § 8, of the Constitution: "throughout the United States."

That it is a part of the United States in the sense in which that term includes what Chief Justice Marshall has called the American empire,

there can be no doubt; so that the question is again narrowed to the meaning of the expression "United States" in the clause of the Constitution which we are considering.

In approaching the determination of this question we must determine whether a narrow or a broad interpretation shall be given to those clauses of the Constitution which are meant for the protection of life, liberty, and property.

To this it seems that there should be but one answer. The Constitution was not a criminal statute, but the greatest "enabling act" of modern times; its protective scope should never be restricted. Protection of all civil rights was its paramount purpose, and it becomes the duty of the court to put that purpose into execution by such an interpretation as will aid and not hamper it. The purpose of the clause in question was manifestly to deprive the governmental authorities of that power of oppression which could be exercised through inequality in taxation. Inequality was an injustice against which every part of the nation was to be protected.

> "For all the great purposes for which the Federal Government was formed, we are one people, with one common country."
>
> "We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption as freely as in our own State."

This is the language of this court in *Crandall* v. *Nevada*, 5 Wall., 49. Was this right reserved solely to the citizens of the original States or of the present States? Should not this be the privilege of an inhabitant of the unorganized district of Alaska?

The freedom of personal transit is no more valuable than the right to carry or convey property throughout the length and breadth of the domain, and the one can no more rightfully be denied than the other.

It has been suggested that this protection against inequality in the imposition of duties was restricted to the State and was the result of mutual State jealousies. At the time of the adoption of the Constitution a number of States claimed the ownership of vast tracts forming part of the various colonies. These tracts were ceded by the various claimants to the General Government as the Northwest Territory, under a compact which provided for the formation of States out of that Territory. Thus the existence of territory to be governed by the Federal authorities was already in contemplation, and the formation of States out of that Territory. Is it conceivable that the States and the people of the States—so jealous of the imposition of taxes—should have combined to protect each other from the encroachments of the Federal Government and been willing to hold the vast territory in question with a view to subjecting it to that inequality in taxation which they deprecated in their own case?

Inconceivable as such a thing is, it is the only ground upon which the term "United States" in the clause under discussion can be so dwarfed and belittled as to exclude from its application the entire domain of the new nation.

If this outlying and unorganized territory was not a part of the United States with reference to this limitation, it was equally outside of the pale of all those other protective restrictions which the voice of

publicists and courts has been unanimous in applying to them. As observed by Pomeroy in his Constitutional Law, § 492:

> "If it were thought necessary that Congress should be hedged around with restrictions while it is legislating for the inhabitants of the States, who may be partially protected by their local governments, how much more necessary that the same body should be restrained while legislating for the inhabitants of those districts and territories over which it has an exclusive control and undivided sway."

Moreover, it seems evident that the term United States in the clause in question was meant in a geographical sense, as embracing the entire domain of the nation. This is the conclusion arrived at by this court in *Knowlton* v. *Moore*, 178 U. S., 176. The words "uniform throughout the United States" do not signify an intrinsic but simply a geographical uniformity. That the Territories are part of the United States in a geographical sense was already held in *Elk* v. *Wilkins*, 112 U. S., 99–102–110–122; in the Cherokee Nation, 5 Pet., 15–17, and in the Cherokee Tobacco, 11 Wall., 619. In the Dred Scott case both Curtis, J., and Campbell, J., referred to Congress as the Legislature of the United States, "of which these Territories make a part." (19 How., 513–14, 623.)

A like question arises in regard to the clause which gives Congress sole authority to pass naturalization laws throughout the United States. Surely it was not intended to deprive the alien inhabitants of the Northwest of the privilege of naturalization. The earliest legislative provisions under this grant included the Territories.

Again, the question arises, in reference to the eligibility of a citizen to the Presidency of the United States. He must be a native citizen of the United States and fourteen years a resident of the United States. (Article II, sec. 1, clause 5.) Will it be seriously contended that a native of New York who has removed to New Mexico or to Oklahoma is no longer a resident "within the United States" and no longer eligible to the Presidency? Is a native of one of the Territories before its admission as a State a natural-born citizen of the United States? We believe this question to be answered by the opinion in *Elk* v. *Wilkins*, 112 U. S., pp. 99–102–110–116, which would have declared a citizen, of an Indian born in the Territories, as being born "within the United States" had he at the same time been "subject to its jurisdiction."

Boyd vs. *Thayer*, 143 U. S., 162.

So, again, it seems plain that the term is used in a geographical sense, meaning the whole territory subject to the sovereignty and dominion of the United States.

Much misapprehension of the question has arisen from the idea that we owe no duties to the inhabitants of the newly acquired Territory, and that Congress has been vested with absolute authority to dispose of their civil rights and political status.

It is not inopportune to say that no such right has been given to Congress, but only the privilege of regulating the civil rights and political status of the NATIVE inhabitants of the ceded territory, and all the other inhabitants are vested with the nationality of the conquering country. By Article IX of the treaty only the natives of Spain residing in the Territories ceded or relinquished are allowed the privilege

of preserving their allegiance to the Crown of Spain, and in order to do this they must within a year from the date of the exchange of ratifications have made a declaration of their intention to preserve such allegiance; in default of such declaration they are held to have renounced it and to have adopted the nationality of the Territory in which they reside. This makes it clear that the nationality of the Territory in which they may reside is imposed *ipso facto* upon all the other inhabitants of the ceded Territories.

But the question here does not involve the civil rights or political status of the inhabitants of Porto Rico. It involves the rights of a citizen of the United States and of the State of New York, and the question whether he shall be compelled to pay duties on oranges shipped to him from Porto Rico while another citizen is exempted from the payment of duties on oranges shipped from Florida.

This misconception of the situation is due largely to the misleading expression "extension of the Constitution to outlying territory."

The Constitution does not expand and does not shrink. It is not a mechanism; it is not a substance, nor is it even, as Professor Fiske suggests, an organism; it has no relation to anything physical; it is purely a legal instrument. It is the CHARTER, the Magna Charta we may say, under which and by virtue of which the officials exercise the powers of the Government of the United States.

It is therefore an inapt use of terms to speak of new peoples or new possessions coming under the Constitution. The Constitution has no direct relation with new peoples or new possessions. It has a direct relation only with the agencies of government which it creates and which it regulates, on the one side, and with the people that ordained it on the other. The Constitution endows certain functionaries of government with certain authority; it lays down rules and principles which must be observed in the government which it establishes; it grants powers, privileges, and immunities, and it enacts prohibitions and definite limitations which may not be overlooked or evaded by the agents of the Government which it establishes.

It is no denial of these propositions to say that all the prescriptions or restrictions of the Constitution are not applicable alike in all places and at all times. This may be conceded. But it does not alter the fact that whatever act is done by governmental agency must be referred back to the constitutional provisions to test its legality.

The power is given to make war, to negotiate peace, to enter into treaties. These particular powers and privileges are not themselves accompanied with any detail. The exercise of them, however, comes under the Constitution. In that fundamental charter there are prohibitions universal and unevadable; in order to read the instrument aright, these prohibitions must not be forgotten in testing the powers to be exercised in making treaties, or making war, or concluding peace. If the Constitution anywhere prohibits cruel and inhuman punishment, prohibits bills of attainder, prohibits the impairment of obligations because these prohibitions are not repeated in that section of the charter which gives a right to negotiate treaties, it can not be inferred that treaties may be negotiated providing for these prohibited acts.

When the Constitution enjoins that all taxes, duties, imposts, etc., shall be uniform throughout the United States, the power thereafter given to Congress to make rules and regulations for the disposition of territory can not be read so as to include an exemption from this injunction of uniformity.

The question, therefore, is not, we repeat, what newly annexed people or newly acquired territory have a right to demand, but what the organs of the Government chartered by the Constitution have a right to do.

If it be urged that the restriction of the governmental agents to their limited powers will create an intolerable political situation, the court has nothing to do with this question of expediency. (Chinese exclusion cases, 130 U. S., 603.) The question of expediency is to be taken into account by the political bodies that make war or peace, that subjugate or purchase new territory, and it is not a function of the court to wrest the law from its true meaning in order to avoid the inconvenience or even the distress that may result from a careless or wanton use or misuse of governmental powers. It is, on the contrary, the function of the court to bring back the authorities to a rightful sense of their responsibilities and to a proper observance of the limitations of their functions.

Nor need there be any concern with reference to the question of expediency. If the people of the United States deem it expedient that the additional powers exercised by their temporary agents should be approved and should be continued to their successors, the people can so ordain. The Constitution has provided an easy method for their so ordaining. It has not established the Supreme Court for that purpose. A constitutional amendment, if demanded by the people, can be presented in Congress and ratified by the legislatures in less time than it will take this court to unravel and determine the momentous questions involved in this case. If a revolution in our method of government and in the principles for which this Government stands is to be made, it should be made by the power which is at the base of all government—the people—for whose benefit the government is made. It certainly should not be done by a court intended to be a conservator of all our institutions, and not the voice of the people, to change the form and character of those institutions.

It has been sought to make a distinction between organized territory and unorganized territory, with the idea that the power of Congress over the latter is more despotic or absolute than over territory to which has been given some governmental organization.

Whatever right Congress possesses must be referred back to the Constitution. There is in the Constitution no greater power or authority given to Congress over the one form of territory than over the other. All government by Congress is subject to the limitations which the Constitution itself has laid down.

Whether we consider California immediately after the ratification of the treaty, or the Public Land Strip, since become a part of Oklahoma, or Alaska (to which the revenue laws were extended in 1868, before the new acquisition had been given any form or shape), or finally any full-fledged territory, no legal distinction as to the power of Congress over them can be found in any statute or constitutional provision, and no legal distinction can be found in any sound theory of government.

Territorial governments are at the mercy of Congress; their privileges can be diminished; laws passed in reference to them can be repealed (*U. S.* v. *Kagama*, 118 U. S., 379). No greater power can be imagined with reference to unorganized territory. The one as well as the other must always be under the protection of the constitutional restrictions which were imposed upon Congress for the benefit of the whole nation.

Alaska is not yet a Territory; Congress has only vouchsafed to erect it into a district: yet, as we have observed, the tariff laws were applied to it as early as 1868, constitutional restrictions have been applied to it, and the serfdom recognized among its native tribes has been declared illegal. (Sah Quah's Case, 31 Fed. Rep., 327.)

English precedent has been invoked, but even in England the rule was long since laid down that the Crown or Parliament could not make laws for the colonies "contrary to the fundamental principles of English law," and that from any such injustice the Privy Council would hear appeals. (The Crown (Sir William Anson), 274; *Campbell* v. *Hall*, 20 St. Trials, 304; Lord Bishop of Natal, 3 Moore P. C., N. S., 115.)

In sustaining the contention that the Constitution has no application to the Territories unless by action of Congress, it is conceded that no such action was taken by Congress prior to 1850 (New Mexico, Sept. 9, 1850), and the direct application of the Constitution to the District of Columbia was made by statute in 1871; but long prior to 1871 it was held—in *Loughborough* v. *Blake*—that the protection of the Constitution covered the District quite as much as the States. This court did not assent to the implied doctrine that until 1850, when Congress for the first time made the Constitution applicable to some Territories, the Constitution was paralyzed and silent with reference to that vast portion of the United States.

To conclude:

The significance of the present controversy lies in its commercial aspect.

In order to sustain the position of the Government it was at first claimed that the Constitution was virtually nonexistent with reference to all portions of the national domain outside of the boundaries of the States. Then, with assumed generosity, this position was gradually receded from until we now see that there is no objection to extending the protection of the Constitution to the new Territories in all matters save in those which may touch the commercial gains of interested parties. A brief has been filed here "in behalf of industrial interests as deeply interested," the brief says, "in the final determination of the questions involved as the Government itself."

> "Every nation in the world," says this brief, "maintains the existence of and asserts its power to tax the products from its colonies or acquired territory. Every nation in the world is expending large sums of money annually in an effort to produce its own supply of sugar, one of the home products that would be seriously affected, if not ruined eventually, if the doctrine contended for here prevails."

The Secretary of War in his report for 1899 concedes "the essential limitations inherent in the very existence of the American Government," but he adds:

"The people of Porto Rico have not the right to demand that duties should be uniform as between Porto Rico and the United States," notwithstanding the plight in which the island would thus be placed. (See pp. 8–9 of this brief.)

In other words, the power of taxation, the power which this court has rightly characterized as the right to confiscate and destroy, must be exercised without restraint and without equality over all that portion of our country and our population not within the sacred precints

of a State. The exercise of that power which fired the revolt of the American colonies, and which was so throughly curbed by the war of the Revolution, must be again revived, strengthened, and enlarged for misuse by the very people who struck it down.

The statement of this proposition seems to involve its own refutation. To enlarge upon it would require the indecorous exhibition of lecturing to this court upon the principles of freedom which it has so often sustained. But as the protection of property, as well as the protection of life and liberty, is one of the essential safeguards set up by the Constitution, we may again reiterate that it was with property that the arbitrary power first tampered, and only with life and liberty when these were used in the protection of the property menaced.

It is to-day property that again menaces the Constitution, and we may be pardoned if we close this brief with the words of the venerable Stephen J. Field, whose long presence upon the bench of this court is a revered memory. At the centennial anniversary of the Supreme Court he said:

> "As population and wealth increase; as the inequalities in the condition of men become more and more marked and disturbing; as the enormous aggregation of wealth possessed by some corporations excite uneasiness lest their power should become dominating in the legislation of the country, and thus encroach upon the rights or crush out the business of individuals of small means; as population in some quarters presses upon the means of subsistence, and angry menaces against order find vent in loud denunciations, *it becomes more and more the imperative duty of the court to enforce with a firm hand every guaranty of the Constitution.* Every decision weakening their restraining power is a blow to the peace of society and to its progress and improvement. It should never be forgotten that protection to property and to persons can not be separated. Where property is insecure the rights of persons are unsafe. Protection to the one goes with protection to the other, and there can be neither prosperity nor progress where either is uncertain."

The imposition of impost duties upon the product of one portion of our territory which is not imposed upon the same product of every portion is an inequality against which conscience revolts and against which the Constitution has protected every portion of this domain.

We trust that this court will once more assert the inviolability of that prescription in the Constititution and reverse the judgment of the court below.

New York, 29th Dec., 1900.

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